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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ERIC W. LIEN, **Plaintiff, Cross-Defendant and Respondent,** **v.** **LUCKY UNITED PROPERTIES INVESTMENT, INC., et al.,** **Defendants, Cross-Complainants and Appellants.**	**A117110** **(San Francisco County Super. Ct. No. CGC-06-454503)**

In July 2006, Eric W. Lien (Lien) filed a malicious prosecution action against appellants Lucky United Properties Investment, Inc., and Chin Teh Shih (also known as Jessie Woo), as trustee for the Woo Family 2000 Trust. In January 2007, appellants responded by filing a cross-complaint, also for malicious prosecution, against Lien, Pi-Cheng Yen (Yen), and their attorney, Albert Lee. The competing claims grew out of a lawsuit originally filed in 1999, involving a dispute over the purchase of real property in San Francisco.[1] Lien successfully filed an anti-SLAPP (strategic lawsuits against public

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, the Background, Discussion and parts I. and II. of this opinion are not certified for publication.

1 The facts relevant to the underlying dispute are set out in considerable detail in our unpublished opinion, *Woo v. Lien* (Oct. 2, 2002, A094960) (*Woo I*), and we will not repeat them in full here.

participation) motion to strike appellant's cross-complaint (Code Civ. Proc., § 425.16), and appellant appeals that ruling. In the published portion of our opinion we reject appellant's contention that, under *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562 (*DuPont*), the trial court erred by failing to issue a statement of decision supporting its order granting the anti-SLAPP motion. In the unpublished portion, we reject appellant's other contentions.

BACKGROUND*

The underlying action arose out of a contract dispute between Ming F. Woo, Lien, and Pi-Ching Yen (Yen), who jointly purchased property in San Francisco in 1996. In August 1999, Ming F. Woo and his company, Lucky United Properties Investment, Inc. (collectively, Woo), sued coowners Lien and Yen for breach of contract, declaratory relief, and specific performance; and, in June 2000, Woo filed an amended complaint alleging causes of action for fraud, breach of contract, abuse of process, and declaratory relief.

In January 2000, Lien and Yen filed a cross-complaint against Woo alleging causes of action for resulting trust, declaratory relief, specific performance, breach of contract, partition, violation of California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and interference with prospective economic advantage. In their UCL claim, which was styled as a single cause of action in the complaint, Lien and Yen alleged that Woo "has, as a matter of business practice and/or act, made agreements with various parties, including but not limited to [Lien and Yen], and then would subsequently breach those agreements in order to reap further monetary gains to feed his insatiable appetite for money at the expense of others," and that Woo has "engaged in a practice or acts of either not paying or avoiding payment of taxes on transactions which generated income."

In March 2000, the trial court sustained, in part, Woo's demurrer to the UCL claim. The court sustained the demurrer without leave to amend as to the claim that Woo

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* See footnote, *ante*, page 1.

violated the UCL by committing tax violations, but overruled the demurrer as to the claim that Woo violated the UCL by breaching agreements, including the agreement with Lien and Yen.

In March 2001, following a bench trial, the court issued judgment in favor of Lien and Yen as to all claims in both the complaint and cross-complaint.[2] In its statement of decision, the court stated that Lien and Yen had met the requirements to prevail on their UCL claim, as they had proven that Woo breached his contractual duty to Lien and Yen.

Woo appealed, and, in *Woo I*, we affirmed the judgment as to five of the six causes of action alleged in Woo's complaint, but reversed as to the final cause of action, which sought a declaration that Woo had properly exercised his right of first refusal. We held that "the defects the trial court relied upon do not invalidate Woo's exercise" of the right of first refusal, and remanded on this issue "to permit Lien the opportunity to adduce evidence in support of any affirmative defenses to [Woo's] claim for declaratory relief." We further noted that the trial court's rulings on Lien's and Yen's cross-complaint, and the relief granted, "were predicated on the determination that Woo did not validly exercise his right of first refusal. Because we conclude that that determination was erroneous, we necessarily reverse the trial court's judgment for Lien and Yen and its order that the Property be partitioned." In December 2005, after a trial on Lien's and Yen's affirmative defenses, the trial court issued judgment in favor of Woo as to his claim for declaratory relief on the exercise of right of first refusal issue, and all claims in Lien's and Yen's cross-complaint.

In July 2006, Lien initiated the instant case, filing a complaint against appellants for malicious prosecution of Woo's underlying complaint. In January 2007, appellants responded by filing a cross-complaint, also for malicious prosecution, against Lien, Yen, and their attorney, Albert Lee. The cross-complaint alleged that Lien and Yen, through

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[2] On September 7, 2007, Lien requested that we take judicial notice of the trial court's March 2001 judgment and statement of decision in the underlying case. However, the judgment and statement of decision appear in the record filed on appeal. Therefore, we deny the request for judicial notice.

Lee, acted maliciously and without probable cause by (1) continuing to prosecute their underlying cross-complaint after remand (first cause of action), and (2) filing and maintaining certain claims in the underlying cross-complaint prior to the first appeal, which alleged that Woo cheated on his taxes and breached contracts with third parties (second cause of action).

In February 2007, Lien filed the anti-SLAPP motion to strike appellants' cross-complaint for malicious prosecution pursuant to Code of Civil Procedure section 425.16.[3] The trial court orally granted the motion at the hearing in March 2007, and issued a written order the following month. The court stated that appellants had not shown a likelihood of success on the merits in the malicious prosecution action, because as to the first cause of action, Lien "did not continue litigating any cross-claim beyond what he convinced the judges to allow," and as to the second cause of action, Woo had "not presented admissible evidence establishing a lack of reasonable grounds to bring the tax evasion claim."

DISCUSSION*

Under section 425.16, subdivision (b)(1), "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the

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3 All undesignated section references are to the Code of Civil Procedure.

***** See footnote, *ante*, page 1.

United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

The parties agree that appellants' malicious prosecution action arises from acts in furtherance of Lien's right of petition or free speech. (See *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 740-741.) Thus the issue is whether appellants have shown a probability of prevailing, that is, "whether [appellants] presented evidence in opposition to [Lien's] anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in [appellants'] favor." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 (*Zamos*).) "Whether [appellants] have established a prima facie case is a question of law. [Citation.]" (*Ibid*.) Therefore, our review is de novo.

I. *First Cause of Action: Continued Prosecution of Cross-Complaint*[*]

Appellants contend that they have shown a probability of prevailing as to their first cause of action, because they have established that Lien and Yen continued to prosecute their cross-complaint without probable cause following remand. Lien argues that appellants have not met their burden, as they have not submitted any evidence showing Lien continued the action after learning it lacked probable cause.

"To establish a cause of action for malicious prosecution, the plaintiff must prove the prior action was: (1) brought by the defendant and resulted in a favorable termination for the plaintiff; (2) initiated or continued without probable cause; and (3) initiated with malice. [Citation.]" (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1422.)

The California Supreme Court has held that in a malicious prosecution action, a party may be held liable for continuing to prosecute a lawsuit after having discovered the suit lacked probable cause. (*Zamos*, *supra*, 32 Cal.4th at pp. 960, 970-972.) *Zamos* held that the plaintiffs had established a probability of prevailing in their malicious

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[*] See footnote, *ante*, page 1.

prosecution action where they submitted evidence that, shortly after the defendants filed their fraud lawsuit, the attorney for the defendants was provided with evidence from which he knew or should have known the suit had no merit. The evaluation of probable cause requires an objective determination of whether pursuit of the underlying lawsuit was reasonable; that is, a determination of whether, based on the facts known to Lien and Yen, the continued prosecution of the cross-complaint was legally tenable. (*Id.* at p. 971.)

Appellants first argue that the remand instructions in our October 2002 decision "precluded any possibility of a retrial of the cross-complaint," and therefore "[n]o reasonable attorney would have demanded retrial of the cross-complaint in the face of these instructions." We disagree.

In *Woo I,* we reversed the trial court's judgment as to Woo's exercise of the right of first refusal, and remanded "to afford Lien the opportunity to introduce additional evidence confined to establishing any affirmative defenses he may have to Woo's purported exercise." We further held that the trial court's rulings on Lien's and Yen's cross-complaint "were predicated on the determination that Woo did not validly exercise his right of first refusal. Because we conclude that that determination was erroneous, we necessarily reverse the trial court's judgment for Lien and Yen and its order that the Property be partitioned." These instructions suggest that to prevail on their cross-complaint at trial, Lien and Yen had to establish an affirmative defense to Woo's purported exercise. Appellants' proffered evidence in opposition to Lien's anti-SLAPP motion merely shows that in December 2004, *before* the court had tried their affirmative defenses, Lien and Yen opposed Woo's motion for judgment on the pleadings as to the cross-complaint. In light of our remand instructions, Lien's and Yen's effort to prevent adjudication of the cross-complaint before their affirmative defenses had been tried was not unreasonable. (*Zamos*, *supra*, 32 Cal.4th at p. 971.)

Appellants further contend that Lien and Yen lacked probable cause to continue prosecuting the cross-complaint after remand because they knew that their affirmative

defenses, upon which the success of the cross-complaint depended, were untenable. However, appellants' evidence does not support this contention.

In *Woo I*, we held that the evidence adduced at the first trial did not support the conclusion that Woo's exercise was invalid, but remanded for presentation of "additional evidence" to establish any affirmative defenses. Appellants assert that Lien knew he had no such additional evidence, and point to the trial court's conclusion, after the second trial, that Lien and Yen had "failed utterly and completely to establish any affirmative defense" and that "[v]ery little, if any, such 'additional' evidence has been adduced" in support of Lien's and Yen's affirmative defenses. However, the trial court's decision merely shows that Woo ultimately prevailed on the exercise issue and the cross-complaint, not that Lien and Yen continued to prosecute their action after discovering it lacked probable cause. (*Zamos*, *supra*, 32 Cal.4th at p. 971.)

Appellants also rely on an excerpt from a hearing transcript, and argue that "Lien was so desperate to hide [his lack of additional evidence] that his counsel lied to the superior court, representing that a January 5, 2000 letter was additional evidence when, as Lien's counsel later admitted, it was not." According to the transcript, in an October 2004 hearing, Lien's and Yen's counsel characterized a document as "smoking gun" evidence and stated it was not presented to the Court of Appeal or to the judge at the first trial. In a second transcript excerpt, Lien's and Yen's counsel revised this earlier statement, explaining that the letter was attached to Woo's deposition transcript, and that the judge presiding over the first trial "read the transcript in total, but nobody actually argued about that letter or stated anything about that letter." In any event, even if counsel mischaracterized evidence at the October hearing, this does not demonstrate that Lien and Yen knew their affirmative defenses lacked probable cause. Appellants have failed to demonstrate that, based on the information known to Lien and Yen at the time, a reasonable attorney would have found their affirmative defenses (or the cross-complaint that depended upon them) untenable.

II. *Second Cause of Action: Allegations of Tax Evasion and Breach of Third-Party Contracts**

Appellants further argue that they have shown a probability of prevailing as to their second cause of action, because they have shown that *some* of the allegations made in the UCL claim, that is, the allegations of tax evasion and breach of third-party contracts, were brought without probable cause. Lien contends that appellants cannot show a lack of probable cause, because the trial court's initial judgment in Lien's favor on the UCL claim established a conclusive presumption of probable cause as to this claim. We agree with Lien's contentions.

The California Supreme Court has held that "a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817, fn. omitted; see also *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 21-22 ["a plaintiff's victory at trial (unless it is obtained by means of fraud or perjury) will act as conclusive proof that there was probable cause for the plaintiff to file the suit, and will thus preclude a cause of action by the defendant for malicious prosecution, even if the victory is reversed by a trial court (such as by entry of a judgment notwithstanding the verdict) or an appellate court"].)

In March 2001, after the first bench trial, the court granted judgment in favor of Lien on all claims, including the UCL claim. In their own cross-complaint for malicious prosecution, appellants stated that "judgment was entered on March 21, 2001, in favor of Lien and Yen on all issues and all counts as to both the complaint and the cross-complaint." Thus, under well-settled law, Lien's victory at trial on the UCL claim, even though later reversed on appeal, is conclusive proof of probable cause to bring this claim. (*Bergman v. Drum, supra,* 129 Cal.App.4th at pp. 21-22.)

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* See footnote, *ante*, page 1.

Appellants rely on *Crowley v. Katleman* (1994) 8 Cal.4th 666 to argue that in spite of the court's judgment in favor of Lien on the UCL claim, appellants' malicious prosecution action may lie against the allegations of tax evasion and breach of third-party contracts. However, *Crowley* is inapposite. In *Crowley*, the Supreme Court held that a malicious prosecution action will lie against a complaint that contains some causes of action or legal theories of liability unsupported by probable cause, even if they are joined with causes of action or legal theories supported by probable cause. (*Id.* at pp. 676-681, 695.) However, as appellants concede, *Crowley* did not hold that a malicious prosecution action will lie against individual allegations within a cause of action, but only that such an action will lie against individual theories of liability or causes of action within a complaint.

Appellants have not cited any authority, and our research has not revealed any, for the proposition that a malicious prosecution action will lie simply because some factual allegations are not supported by probable cause. To allow malicious prosecution actions against individual allegations within a cause of action, even when the cause of action as a whole is supported by probable cause, would greatly expand the tort of malicious prosecution. Such an expansion of the tort would be contrary to the California Supreme Court's repeated statements that malicious prosecution is a disfavored cause of action, both because it can have a chilling effect on an individual's willingness to report criminal conduct or bring a civil suit, and because it initiates a new round of litigation itself. (*Zamos, supra*, 32 Cal.4th at p. 966; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872.) Furthermore, we fail to see the value of allowing a malicious prosecution suit against individual allegations within a cause of action, when the cause of action as a whole has merit. In the absence of any authority permitting a malicious prosecution suit against individual allegations within a cause of action, we decline to expand the tort to allow such actions.

Appellants maintain that *Crowley* is analogous to the instant case because the UCL claim, although styled as a single cause of action, actually contained three discrete causes of action: tax evasion, breach of contracts with third parties, and breach of contract with

Lien and Yen. We disagree. A cause of action must involve a primary right of the plaintiff, a primary duty of the defendant, and a breach of the right and duty by a delict, or wrong, committed by the defendant. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 24, p. 85.) Here, Lien's cross-complaint alleges, as its sixth cause of action, that Woo's "practices and/or acts are unlawful, fraudulent, and unfair within the meaning of the [UCL]." It contains two paragraphs alleging specific acts of misconduct, including that "Woo has, as a matter of business practice and/or act, made agreements with various parties, including but not limited to [Lien and Yen], and then would subsequently breach those agreements in order to reap further monetary gains to feed his insatiable appetite for money at the expense of others," and that Woo has "engaged in a practice or acts of either not paying or avoiding payment of taxes on transactions which generated income." These alleged acts of misconduct are not separate causes of action, but are merely separate facts alleged to support a single cause of action for violation of the UCL.[4] We conclude that the court's initial judgment in Lien's favor on the UCL claim creates a conclusive presumption of probable cause as to this claim, and therefore appellants cannot show a probability of prevailing on their malicious prosecution claim.

III. *Statement of Decision*

Appellants argue that the trial court erred in refusing to issue a statement of decision, and this error requires reversal. We disagree.

Section 632 states that, "upon the *trial* of a question of fact," the court must issue "a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party." (Italics

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4 In the underlying action, the trial court sustained Woo's demurrer without leave to amend as to the allegation that Woo committed tax violations. It is well-settled that "[a] demurrer must dispose of an entire cause of action to be sustained" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119), and therefore it could be argued the trial court's action supports Woo's contention that the tax evasion claim is a separate cause of action. However, we conclude that the trial court improperly granted this demurrer because the tax evasion claim was merely a factual allegation supporting the UCL cause of action.

added.) The requirement of a written statement of decision generally does not apply to an order on a motion, even if the motion involves an evidentiary hearing and even if the order is appealable. (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.)

Appellants rely on *DuPont, supra,* 78 Cal.App.4th 562 to argue that a statement of decision must accompany an order granting an anti-SLAPP motion. In *DuPont,* the court held that the defendant drug manufacturer's alleged false statements in its advertising and public relations efforts constituted acts in furtherance of the defendant's right of petition or free speech in connection with a public issue, and therefore the first prong of the anti-SLAPP statute had been satisfied. The court further held that, because the trial court had erroneously concluded the first prong of the statute had not been met, remand was necessary to allow the court to determine whether the second prong of the statute had been satisfied, that is, whether plaintiffs had established a probability of prevailing. (*DuPont,* at pp. 565-568.) In the introduction to its opinion, the court stated that if the trial court's determination on remand "results in a judgment striking the complaint, [it] should be supported by a statement of decision." (*Id.* at p. 564.)

We have reservations about *DuPont*'s imposition of a requirement for a statement of decision when a trial court grants an anti-SLAPP motion. First, the anti-SLAPP statute, section 425.16, contains no such requirement. In addition, *DuPont* did not cite any authority for departing from the general rule that a statement of decision does not apply to an order on a motion, and did not repeat this requirement in the disposition. (*DuPont, supra,* 78 Cal.App.4th at pp. 564, 569.) Further, the court's statement is dicta that has not been adopted by any subsequent case.

Courts have created exceptions to the general rule limiting statements of decision to trials. An examination of these cases is instructive. "In determining whether an exception should be created, the courts balance ' "(1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings." [Citation.]' [Citation.]" (*In re Marriage of Askmo, supra,* 85 Cal.App.4th at p. 1040.) In *Gruendl v.*

Oewel Partnership, Inc. (1997) 55 Cal.App.4th 654, 660-662, for example, the court held that a statement of decision is required following a motion to amend judgment to add a judgment debtor on an alter ego theory. The court reasoned that important interests were at stake, as the motion would impose liability on an individual "for a substantial monetary judgment upon the trial of a case in which [the individual] was neither named nor served as a defendant." (*Id.* at p. 661.) The court further reasoned that in resolving the motion, the court "necessarily 'tried' . . . issues of fact" related to the alter ego theory, and noted that the absence of factual findings had made review problematic. (*Ibid*.) Courts have also created an exception for proceedings involving the custody of minors. (*In re Rose G.* (1976) 57 Cal.App.3d 406, 418 ["[i]n custody-of-minors proceedings, the issues at stake are of such tremendous consequences that findings of fact and conclusions of law as required by section 632 . . . must be considered applicable even though the proceeding is denominated a 'special proceeding' "].)

Anti-SLAPP motions often place important interests at stake, but they are distinguishable from those motions that have been declared exceptions to the general rule recited in section 632. Although the court considers evidentiary submissions in deciding an anti-SLAPP motion, it does not "try" issues of fact. (*Zamos*, *supra*, 32 Cal.4th at p. 965.) In deciding the motion, "the court does not *weigh* the credibility or comparative probative strength of competing evidence," but instead "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821; accord, *Zamos*, at p. 965.) Furthermore, the absence of factual findings has not precluded effective review. These factors weigh heavily against creating the exception sought by appellants, and we decline to depart from the general rule that a statement of decision is not required for an order on a motion.

In any event, appellants fail to explain why the order issued by the trial court is inadequate. After the hearing, the trial court issued a one-page written order stating that appellants had not shown a likelihood of success on the merits on either cause of action for malicious prosecution and set forth its reasons for so concluding. In addition, the

court stated in the order that Woo's "request for a *further* statement of decision is denied." Thus, although the document is entitled an "order," it is apparent that the court considered this document to be a statement of decision and had concluded no further statement of decision was required. Appellants never argue that this statement of decision was inadequate, and we decline to find it so.

DISPOSITION

The order granting the motion to strike is affirmed. Lien is entitled to his costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

Superior Court of the City and County of San Francisco, No. CFC-06-454503, Peter J. Busch, Judge

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